STATE OF MICHIGAN
IN THE SUPREME COURT

MARY A. DONOHO

Plaintiff-Appellee,

v

Court of Appeals No. 256525
WCAC Docket No. 03-0235

WAL-MART STORES, INC. and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Defendant-Appellants.

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APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

Defendants, Wal-Mart Stores, Inc. and Insurance Company of the State of Pennsylvania, hereby apply for leave to appeal, pursuant to MCR 7.302, as follows:

A. The judgment from which this appeal is taken

This is a worker's compensation matter. Defendants appeal from the Opinion and Order entered by the Worker's Compensation Appellate Commission on June 8, 2004. A copy is attached hereto as Exhibit A. Defendants applied for leave to appeal to the Court of Appeals. The Court of Appeals denied the Application by Order dated October 29, 2004. A copy of that Order is attached hereto as Exhibit B.

Plaintiff earlier prevailed on a claim against these defendants for worker's compensation benefits. Later, however, the parties fell into dispute over certain medical expenses. In a petition that brought the matter before the Commission, the plaintiff claimed medical benefits, and also that he was entitled to a 30% attorney fee on the award of medical benefits, pursuant to §315(1) of the Worker's Compensation Act. The Magistrate awarded the medical benefits, and also held that the plaintiff was entitled to a 30% attorney fee over and above the awarded medical benefits. (Exhibit D).

Defendants appealed to the Worker's Compensation Appellate Commission. They argued that any award of attorney fees must be expressly authorized by statute, and that the literal language of the statutory provision upon which plaintiff relied did not authorize an award of attorney fees in this circumstance. Though defendants recognize that earlier decisions of the Appellate Commission and of the Court of Appeals in 1984, authorized an award of attorney fees in this circumstance, that precedent was wrong and should be overturned.

In this decision of the Appellate Commission, two of the Commissioners upheld the award of attorney fees based strictly upon prior precedent, but without making any particular comment on the propriety of that statutory reading. Commissioner Leslie, however, concurred in the result but said that

the statutory language cannot possibly support the award of attorney fees. Commissioner Leslie cited his prior concurring opinions in other cases, where he has taken the same position.

B. Questions Presented for Review

The Magistrate imposed the attorney fee, in addition to the award of medical benefits, pursuant to §315(1) of the Worker's Compensation Act. Though the language of that section has been interpreted to permit such an award in prior decisions of the Appellate Commission, and in decisions of the Court of Appeals in 1984, that interpretation is completely wrong. Indeed, Commissioner Leslie has so explained in concurring opinions in two cases, both of which he notes in his concurrence here. His Opinion in the first of those, *Stankovic v Kasle Steel Corp.*, 2000 ACO #124, is attached hereto as Exhibit C.

As Commissioner Leslie states, the attorney fee awards are based upon a wrong interpretation of the statute in question. Defendants ask that the Court review this issue now, just as Commissioner Leslie asks that the appellate courts, "...revisit and correct the problem originally spawned by an erroneous interpretation of the law ...".

The issue before this Court is properly stated as follows:

> **WHETHER MCL §418.315(1) PROVIDES AUTHORITY FOR THE MAGISTRATE TO AWARD ATTORNEY FEES ABOVE AND BEYOND THE AWARD OF MEDICAL BENEFITS?**
>
> Plaintiff-Appellee says, "yes."
>
> The Magistrate said, "yes."
>
> The Appellate Commission says, "yes," based upon prior precedent.
>
> The Court of Appeals denied defendant's Application for Leave.
>
> Defendants-Appellants say, "no."

C. The Court should grant leave because this is a legal issue of significant importance to worker's compensation law in the State of Michigan

Without question, this case poses an issue of great significance to worker's compensation law in the State of Michigan. Worker's compensation benefits are awarded in two different forms – wage loss benefits and medical benefits. When claimants seek recovery of either, they are usually represented by counsel. The Magistrate's authority to award payment of attorney fees is entirely statutory; that is, it is derived from the Worker's Compensation Act. Without the statutory authority, the Magistrate has no power to award attorney fees to be paid by the defendant employer or its insurer.

The Act provides authority for an award of attorney fees on a contingency schedule, when the Magistrate gives wage loss benefits. (MCL 418.848; R 408.44). The Act does not do so with regard to medical benefits. As Commissioner Leslie explains, both the Commission and the Court of Appeals have, in the past, wrongly interpreted §315(1) as authority for an award of attorney fees on medical benefits. That interpretation of the language is incorrect. It is for the Legislature to decide whether attorney fees should be paid by the defendant, when medical benefits are awarded. The Legislature has not done so.

It is easy to see that this Court's correction of the law will have a significant impact on worker's compensation law in the State of Michigan. Consequently, defendants urge the Court to take the matter, so that the Act will be correctly applied, as written, in the future.

STATEMENT OF APPELLATE JURISDICTION

The Worker's Compensation Appellate Commission issued its decision on June 8, 2004. Defendants filed a timely Application for Leave to Appeal with the Court of Appeals; that is, within 30 days after the Appellate Commission decision. The Court of Appeals had jurisdiction pursuant to MCR 7.203(B)(3), and MCL 418.861.

Defendants now file their Application for Leave to Appeal, following the Court of Appeals October 29, 2004 Order Denying Leave, within 42 days after that date. Consequently, this Court has jurisdiction to hear the Application by virtue of MCR 7.301(A)(2), MCR 7.302(C)(2)(a), and MCL 418.861.

STATEMENT OF FACTS

The facts necessary for this appeal are few and undisputed. Moreover, they are evident upon the face of the Magistrate's decision, since the issue offered to the Commission, and now here, is purely a matter of law.

This appeal is predicated upon two things. First, the Magistrate concluded that plaintiff was correct about many, but not all, of the medical benefits she claimed. Thus, the Magistrate ordered payment of certain of the claimed benefits. Second, the Magistrate ordered that defendant pay a 30% attorney fee over and above those medical expenses. The Magistrate said:

> The final issue is whether plaintiff's counsel is entitled to a 30% attorney fee on unpaid medical bills and related expenses. §315(1) of the Act provides broad discretion to grant an attorney fee when an employer or carrier fails to pay medical expenses. I believe that a 30% attorney fee is justified under the circumstances of this case....

(Magistrate Opinion, p. 5).

The Appellate Commission affirmed the Magistrate's holding. Hence, the issue offered on appeal to the Court is this: whether §315(1) of the Act, or any other legal authority, authorizes the Magistrate to award plaintiff attorney fees from the defendant, over and above the benefits that are to be paid.

ARGUMENT

NEITHER §315(1) OF THE ACT, NOR ANY OTHER LEGAL AUTHORITY, AUTHORIZES AN AWARD OF ATTORNEY FEES AS ORDERED BY THE MAGISTRATE HERE.

A. The Worker's Compensation Law of This State Is Purely Statutory; and Neither the Magistrates, the WCAC, Nor the Courts Can Alter or Amend the WDCA to Provide a New and Additional Remedy.

The worker's compensation law of this state is purely statutory, and the Magistrates, the WCAC, and the courts are bound by what the Legislature has said and has not said. None of them is free to alter or amend the WDCA to accomplish some result for which the Legislature has not provided.

> "There is no question that the WDCA is a legislative creation which is in derogation of the common law. *Tews v C F Hanks Coal Co*, 267 Mich 466, 468; 256 NW 227 (1934); *Revard v Johns-Manville Sales Corp*, 111 Mich App 91, 95; 314 NW2d 533 (1981), lv den 417 Mich 854 (1983). 'It is arbitrary and where it speaks nothing can be added nor changed by judicial pronouncement.' *Tews*, supra at 468-469. It is the sole prerogative of the Legislature to alter or modify a provision of the WDCA, *Derwinski v Eureka Tire Co*, 407 Mich 469, 482; 286 NW2d 672 (1979)." *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 363-364; 459 NW2d 279 (1990) (Opinion of Riley, J. with Brickley and Griffin, JJ, concurring).
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> * * * * * * *
>
> "* * * But this Court is not free to amend the Worker's Disability Compensation Act to square with its own view of good public policy. That is the sole prerogative of the Legislature. *Derwinski v Eureka Tire Co*, 407 Mich 469, 482; 286 NW2d 672 (1979). * * *" *Feld v Robert & Charles Beauty Salon*, 435 Mich 352, 363-364; 459 NW2d 279 (1990) (Concurring Opinion of Boyle, J.).
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> "The appeal board does not have the authority to alter or modify a provision of the Worker's Disability Compensation Act, by interpretation or otherwise in order to square that provision with the board's perception of good public policy. That is solely the Legislature's prerogative." *Derwinski v Eureka Tire Co*, 407 Mich 469, 482; 286 NW2d 672 (1979).

Given this principle, it is clear beyond question that a Magistrate has the authority to grant an award of attorney fees only if the WDCA or the Administrative Rules governing worker's compensation

cases allows him or her to render such an award. In the absence of such statutory or administrative authority, an award of attorney fees has no validity.

B. Attorney Fees Generally May Not Be Awarded As an Element of Costs or Damages Unless Expressly Allowed by Statute, Court Rule, or a Recognized Exception.

The principle limiting the power of Magistrates, the WCAC, and the courts in worker's compensation matters has particular applicability to awards of attorney fees because it is a well established rule of Michigan law that such fees can be awarded only when there is express authority for doing so. The general rule is that attorney fees are not recoverable in most proceedings and that some particular, express grant of authority must underlie any award of such fees. This principle was clearly expressed in *Rzanca v LDI, Inc*, 209 Mich App 711; 531 NW2d 836 (1995), which concerned the recoverability of attorney fees under MCL 418.861b for vexatious appeals.

> "Further, attorney fees may not be awarded as an element of costs or damages unless expressly allowed by statute, court rule, or a recognized exception. *Brooks v Rose*, 191 Mich App 565, 574-575; 478 NW2d 731 (1991). In worker's compensation practice, costs are distinct from attorney fee. MCL 418.858; MSA 17.237(858). Section 861b does not provide for an award of attorney fees. The WCAC had no authority to award attorney fees in this case." 209 Mich App at 715.

Taken together, the two principles discussed immediately above show quite clearly that an award of attorney fees in a worker's compensation case can be made only if it is supported by express authority in the WDCA or the Administrative Rules. Neither the Magistrates, the WCAC, nor the courts have the authority to render an award of attorney fees in a worker's compensation proceeding absent such express authority.

C. MCL 418.315(1) Does Not Authorize An Award Of Attorney Fees Against The Defendant; Instead, Its Unambiguous Language Provides Only For A Proration Of Attorney Fees Between Plaintiff And The Medical Provider, Depending Upon Which One Is Receiving The Money.

In this case, the Magistrate relied upon §315(1) of the Act as authority to award attorney fees to be paid by the defendant. Admittedly, current case law from the Appellate Commission and from older

decisions of the Court of Appeals give that interpretation to §315(1). Unfortunately, as Commissioner Leslie explained in his concurrence in *Stankovic v Kasle Steel Corporation*, 2000 Mich ACO 437, that is exactly opposite of the literal and unambiguous language of the statute. A copy of that decision is attached hereto as Exhibit C. Defendant adopts Commissioner Leslie's concurrence for this argument, and there is no need to restate what is so well stated there. One paragraph of that concurrence bears repeating here, although defendant adopts the concurrence in its entirety:

> I submit that defendant in this case is perfectly correct when it argues that the proration of the fees is between the employee and the provider of services and does not impose an additional obligation on the employer. The last sentence [of §315(1)] states that reimbursement for medical expenses is to be made to the employee or to the party to whom the unpaid expenses may be owing. In no way does this language, reasonably interpreted, create an obligation on the part of the employer to pay fees over and above the obligation to pay the medical benefit. It clearly provides for a division of the fee based on the interests of those who recover. To the extent that the employee paid for medical expenses he or she owes the fee. To the extent that medical providers are paid directly, they owe the fee.

As Commissioner Leslie has pointed out, this statutory command is clear. It offers no ambiguities that might require judicial construction. That being the case, judicial construction of the language to permit anything other than its plain command is not permissible, under ordinary rules of statutory construction. One well recognized rule is that judicial construction of plainly stated and unambiguous statutory language is unnecessary and, therefore, precluded. In *Arrigo's Fleet Service, Inc. v State of MI*, 125 Mich 790, 792; 337 NW2d 26 (1983), the Court of Appeals relied upon earlier Supreme Court precedent and concluded that there may be no judicial construction of plainly stated legislation:

> It is perhaps the most fundamental rule of statutory construction that the legislature must be presumed to have intended the plain meaning of the words used in the statute and that when the meaning of the words used is clear and unambiguous, judicial construction or interpretation which changes that meaning is not permitted. *McQueen v Port Huron City Commission*, 194 Mich 328, 342; 160 NW 627 (1916).

This principal of construction applies even if the Court might think that the Legislature intended something other than what it has stated in the statute. In *George v International Breweries, Inc.*, 1 Mich App 129, 132; 134 NW2d 381 (1965), the Court said:

> We decline to read into §45 meaning other than that expressed by its language. We follow the rule of law frequently quoted from *People v Lowell* (1930), 250 Mich 349, 359; "even though the court should be convinced some other meaning was really intended by the law-making power, and even though the literal interpretation should defeat the very purposes of the enactment, still the explicit declaration of the legislature is the law, and courts must not depart from it.

The rule was applied by the Supreme Court in *Lorencz v Ford Motor Co.*, 439 Mich 370, 376-377; 483 NW2d 844 (1992). Citing a number of prior cases, the Court said, "When a statute is clear and unambiguous, judicial construction or interpretation is unnecessary and therefore, precluded..."

Hence, Commissioner Leslie is exactly right. The rule that has been applied by the Courts, and by the Appellate Commission, gives an interpretation of §315(1) that is exactly the opposite of its literal, unambiguous language. That interpretation and application of a statute is wrong as a matter of law and must not stand. Although the Commission felt compelled in this case to permit the award based upon prior precedent, that precedent is clearly wrong. The Supreme Court should grant leave to appeal in recognition of the fact that the statute has been misinterpreted. The Court must correct that misinterpretation now.

RELIEF REQUESTED

For all of the foregoing reasons and authorities, defendants respectfully request that this Court grant leave to appeal, and that upon leave granted, it reverse the decision of the Court of Appeals, the Worker's Compensation Appellate Commission, and the decision of the Magistrate, where they have awarded attorney fees to the plaintiff.

DATED: December 2, 2004

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